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IN THE

Supreme Court of the United States

October Term, 1962.

No. 831.

GENERAL ELECTRIC COMPANY,
and
HENRY W. SAWYER, III,
Petitioners,

v.

HONORABLE WILLIAM H. KIRKPATRICK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
A. The Ruling of the District Court Emasculates the Attorney-Client Privilege as Applied to Corporations	8
B. The Ruling of the District Court Infringes Upon the Attorney-Client Privilege of the Individuals Interviewed by Counsel	12
C. The District Court Neglected to Apply the Work-Product Principle, Which Protects From Disclosure the Contents of Memoranda Prepared by Counsel in Anticipation of Litigation	15
D. This Is an Appropriate Case for the Court of Appeals to Grant the Relief Requested Under the All-Writs Section of the Judicial Code	16
CONCLUSION	18
APPENDIX A	19
APPENDIX B	25
APPENDIX C	28
APPENDIX D	32
APPENDIX E	35
APPENDIX F	36
APPENDIX G	37

TABLE OF CASES CITED.

	Page
Atlass v. Miner, 265 F. 2d 312 (7th Cir. 1959), aff'd, 363 U. S. 641 (1960)	18
Beacon Theatres, Inc. v. Westover, 359 U. S. 500 (1959)	18
Dairy Queen, Inc. v. Wood, 369 U. S. 469 (1962)	2, 8, 18
Ex Parte Kawato, 317 U. S. 69 (1942)	8
Ex Parte Peru, 318 U. S. 578 (1943)	18
Ex Parte United States, 287 U. S. 241 (1932)	18
Hadjipateras v. Pacifica, S. A., 290 F. 2d 697 (5th Cir. 1961)	17
Hartley Pen Co. v. United States Dist. Ct., 287 F. 2d 324 (9th Cir. 1961)	18
Hickman v. Taylor, 329 U. S. 495 (1947)	11, 15
House v. Mayo, 324 U. S. 42 (1945)	8
La Buy v. Howes Leather Co., 352 U. S. 249 (1957)	18
Neff v. Pennsylvania R. R., 173 F. 2d 931 (3d Cir. 1949)	17
Radiant Burners, Inc. v. American Gas. Ass'n, 207 F. Supp. 771, adhered to on rehearing, 209 F. Supp. 321 (N. D. Ill. 1962)	8, 17
United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950)	11
Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954)	11

STATUTES AND AUTHORITIES CITED.

	Page
Canons of Ethics of the American Bar Association, Canon 37	12
Comment, The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment, 56 Nw. U. L. Rev. 235 (1961)	11
Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., Ser. 11 (1958)	17
Judicial Code, 28 U. S. C.:	
Section 1254(1)	2, 8
Section 1292(b)	3, 6, 17
Section 1651(a)	2, 3, 8, 18
4 Moore, Federal Practice (2d ed. 1962):	
¶ 26.37[4]	18
¶ 26.37[6]	17
6 Moore, Federal Practice (2d ed. 1953):	
¶ 54.12[1]	16
Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351 (1961)	17
Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940 (1961)	17
Note, Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code, 69 Yale L. J. 333 (1959)	17
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 128 (Wolfson & Kurland ed. 1951)	8
Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L. J. 953 (1956)	11
8 Wigmore, Evidence (McNaughton rev. 1961):	
§ 2291	9
§ 2292	9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 31, 1962.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania, printed in Appendix A hereto, *infra*, pp. 19-24, is reported *sub nom. City of Philadelphia v. Westinghouse Electric Corp. et al.*, at 210 F. Supp. 483. The order of the Court of Appeals for the Third Circuit, denying petitioners' application for writs of mandamus and prohibition, is printed in Appendix F hereto, *infra*, p. 36.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 31, 1962. Rehearing was denied on January 16, 1963. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code. In seeking review in this manner, petitioners place particular reliance on the recent case of *Dairy Queen, Inc. v. Wood*, 369 U. S. 469 (1962).

QUESTIONS PRESENTED.

The question before this Court is whether the Court of Appeals erred in refusing to grant petitioners' request for extraordinary relief. Petitioners contend that such refusal constituted error for the following reasons:

First, the District Court, in its ruling, all but denied corporations the protection of the attorney-client privilege by severely restricting the group of corporate employees deemed capable of making privileged communications to counsel.

Second, the ruling of the District Court infringes upon the attorney-client privilege of the individuals interviewed by counsel.

Third, the District Court totally ignored the applicability of the work-product principle upon which petitioner Sawyer had relied.

Fourth, this is an eminently appropriate case for the Court of Appeals to exercise its discretion under Section 1651(a) of the Judicial Code and grant the relief requested by petitioners, in that: (a) the privileges claimed are critically important to petitioner General Electric Company and twenty-eight other corporate defendants in litigation involving a large segment of the American economy; (b) the ruling of the District Court lacks the support of any precedent or authority and, if adhered to, will seriously impair

the effectiveness of counsel retained by corporations; (c) the District Court wrongfully denied petitioners the opportunity to obtain interlocutory review under Section 1292(b) of the Judicial Code; and (d) only the issuance of the writs prayed for can correct an error which, although it will pervade all aspects of this litigation, might otherwise be irremediable.

STATUTES INVOLVED.

The statutory provisions involved are the Interlocutory Appeals Act, 28 U. S. C. § 1292(b), and the All-Writs Section of the Judicial Code, 28 U. S. C. § 1651(a). These provisions read as follows:

§ 1292. Interlocutory Decisions.

* * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE.

Petitioner General Electric Company is presently engaged in defending 145 treble damage antitrust suits in the Eastern District of Pennsylvania, and, since 1959, petitioner Sawyer, a member of the Pennsylvania bar, has represented General Electric Company in the defense of these suits and related criminal proceedings.

The District Court's discovery order which is the subject of this appeal has been entered in sixteen of the 145 cases, but, as will appear, the consequences of that order must be assessed in the perspective of the mass of litigation now pending throughout the United States against petitioner General Electric Company and twenty-eight other manufacturers of electrical equipment. This litigation has grown out of criminal proceedings instituted by the Government in the United States District Court in Philadelphia between February and October, 1960. By most recent count, a total of 1,831 separate suits have been filed against the defendants in thirty-two judicial districts. Petitioner General Electric Company is named as a defendant in 1,679 of these suits. The damages claimed, to which the defendants are jointly and severally exposed, are admittedly enormous.

In order to cope with the problems posed by litigation of this unique magnitude and character, the Chief Justice of the United States appointed, in February, 1962, a subcommittee of federal judges, headed by Chief Judge Albert Murrah of the Tenth Circuit Court of Appeals. Thereafter, a national discovery program was formulated; uniform procedures have been established for taking depositions to be used nationally, for releasing grand jury transcripts, and for collecting all relevant documents in a national depository. As a result of the Murrah Committee's work, it is even truer now than formerly that whatever happens in

one district inevitably affects and very frequently determines the conduct of litigation in every other district.

This petition seeks authoritative resolution of a problem which concerns all defendants, that is, the status of memoranda and documents prepared by counsel and containing information received from employees of the corporate client. On October 6, 1959, at a time when grand jury investigations were taking place in Philadelphia, counsel for petitioner General Electric Company began to interview certain of the company's employees and officials as part of the preparation for and defense of threatened criminal and civil actions involving the company. These interviews were conducted by both house counsel and outside counsel retained by petitioner. During the period from October 6, 1959, to September 14, 1961, about fifty individuals were interviewed, all of them of high executive rank in the company. Twenty-nine of them appeared, at one time or another, before the grand jury. Sixteen of them were indicted by the grand jury.

Counsel invariably put down on paper the information acquired during the course of these interviews. A total of over 100 memoranda, covering at least that many interview sessions, were prepared. These memoranda were based upon counsel's recollections of the substance of the conversations held on those occasions and necessarily represented, to some extent, a blend of communicated information and impressions formed by the interviewer, either at the time of the interview or later on. The contents of the memoranda have been disclosed only to counsel.

The particular interrogatories which the District Court, in its order, has directed petitioner General Electric Company to answer, at the pain of suffering default judgment on the issue of liability, relate to a proxy statement sent by petitioner to its shareholders on March 17, 1961. These interrogatories are set forth in Appendix C, *infra*, pp. 28-31. From the outset petitioner has objected to these interrogatories as invading the area of privileged communica-

tions between counsel and client. It will be seen, for example, that Interrogatory 1(h) requires an answer which would reveal the contents of memoranda counsel prepared after interviewing petitioner's employees.

Judge Kirkpatrick approached the question of privilege in its clearest context: he held that petitioner's claim of privilege was "without any valid basis." Appendix A, *infra*, p. 19. His order provided:

> "Said answers . . . shall include information obtained by defendant at any time from, through or by any of defendant's officers, agents or employees, whether or not said persons are still employed by defendant or were disciplined or discharged by it. . . ." Appendix B, *infra*, p. 26.

In short, the order comprehends *all* memoranda prepared by counsel.

While acknowledging that corporations could successfully invoke the protection of the attorney-client privilege, Judge Kirkpatrick held that only a limited group of employees spoke *as the corporation* when they confided in corporate counsel. For him the touchstone was whether "the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation make take upon the advice of the attorney, or . . . is an authorized member of a body or group which has that authority . . . ." Appendix A, *infra*, p. 22. He found that none of petitioner's employees who consulted counsel could be so classified.

Petitioner immediately requested certification of this ruling under the Interlocutory Appeals Act, 28 U. S. C. § 1292(b). Appendix D, *infra*, pp. 32-34. Its request was refused, but not without the expression of hope by Judge Kirkpatrick that his decision would be reviewed "as soon as possible." Appendix E, *infra*, p. 35. On November 7,

1962, petitioner filed an application for writs of prohibition and mandamus in the Third Circuit Court of Appeals. Over the dissent of Chief Judge Biggs, that petition was denied out-of-hand, by two judges of a three-judge panel, on December 31, 1962. Appendix F, *infra*, p. 36. An application for rehearing was denied on January 16, 1963, with Chief Judge Biggs again noting his dissent. Appendix G; *infra*, p. 37.

REASONS FOR GRANTING THE WRIT.

Preliminarily it should be noted that whatever doubt may have previously existed, *Dairy Queen, Inc. v. Wood*, 369 U. S. 469 (1962), conclusively establishes that this Court will review a Court of Appeals' denial of a petition for writs of mandamus and prohibition by granting certiorari under 28 U. S. C. § 1254(1), and not by requiring the petitioner to apply to this Court for relief under 28 U. S. C. § 1651(a). *Compare Ex Parte Kawato*, 317 U. S. 69 (1942); *House v. Mayo*, 324 U. S. 42 (1945); and Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* § 128 (Wolfson & Kurland ed. 1951). This is so even though the Court of Appeals' order denying the petition may not have been accompanied by an opinion, for that was precisely the situation in *Dairy Queen, Inc. v. Wood*.

A. The Ruling of the District Court Emasculates the Attorney-Client Privilege as Applied to Corporations.

Chief Judge Campbell, of the Northern District of Illinois, has recently held in an antitrust case that the attorney-client privilege is not available to corporations. *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771; *adhered to on rehearing*, 209 F. Supp. 321 (N. D. Ill. 1962). Judge Kirkpatrick found himself unable to follow Judge Campbell because, as he put it, "the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist." Appendix A, *infra* p. 20. Nevertheless, the theory of the attorney-client privilege devised by Judge Kirkpatrick accomplishes much the same result: it denies to corporations of size the protection of that privilege, and particularly in litigation which threatens the very existence of such corporations.

The Kirkpatrick rationale is based, as his opinion clearly indicates, on a literal reading of Wigmore's classic definition of the attorney-client privilege. See 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961). One of the eight requirements enumerated by Wigmore is that the *client* must have made the communications to a lawyer in order to obtain legal advice. To be sure, the question has always been who is the client, *i.e.*, whether the employees who confided in counsel were, for purposes of the privilege, the corporate client. Judge Kirkpatrick's conclusion was that, in order to be speaking as the client, these employees had to be capable of participating in "a decision" reached on the basis of advice given by counsel to the corporation.

In so concluding, Judge Kirkpatrick was guilty of three basic errors. First, he lost sight of the difference between an individual consulting his lawyer and a corporation consulting its lawyer or lawyers. In the former situation, the individual is both the source of facts and the recipient of advice. In the latter, the sources of fact are almost invariably separated from that level of the corporate hierarchy which reaches a decision on the advice of counsel.

Second, Judge Kirkpatrick ignored the policy behind the attorney-client privilege, which is to encourage candor in those disclosing information to counsel. 8 Wigmore, *Evidence* § 2291 (McNaughton rev. 1961). What is the need for candor, however, if those whose communications are protected by the privilege have nothing to disclose? On the other hand, the policy behind the privilege is unquestionably vindicated if employees suspected of wrongdoing which may result in liability for the corporation are encouraged to confide freely in counsel, for, in no other way, can the corporation ascertain the facts essential to its defense.

Third, under the Kirkpatrick rationale, the degree of protection afforded a corporation by the privilege varies inversely with the degree of importance which a particular

legal problem assumes for that corporation. It is perfectly true that the authority to act after receiving advice of counsel will be shared with the lower echelons in cases where the vital interests of a company are not affected and that, as the decision becomes more critical, the group having the power to make it contracts in size. In light of that fact, it would be a curious rule indeed which maximizes protection when protection is least needed. Yet that is exactly where Judge Kirkpatrick's logic leads—as may be seen in the following quotation from his opinion:

> "It is obvious that the matter as to which the witnesses in this case made the disclosures was a matter of overwhelming importance to the corporation, and that even a department or division head or an employee on a similar managerial level would hardly be given any substantial role in making that decision. It was a matter which, of course, the corporation knew made it probable that very heavy claims for damages would be asserted against it and a decision of that kind could have been made only by the very highest authority.
>
> "Of course, there may be cases where an employee is actually authorized to make a decision after consultation with an attorney. An example might be the head of the Claims Department, who frequently has authority to settle damage claims without any action by the Board of Directors of the chief officers, or without their even being advised of it. In such case the communication would be privileged because the claims executive was the person who could act upon the lawyer's advice and he was the person receiving it." Appendix A, *infra*, p. 23.

There is very little law on the scope of the attorney-client privilege as applied to corporations. In an earlier treatment of this subject, Judge Wyzanski held that the

privilege attached to information obtained by an attorney from *any* employee of the corporation. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950); see *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954). It was Judge Kirkpatrick's expressed conviction that *Hickman v. Taylor*, 329 U. S. 495 (1947), was *contra* in its apparent differentiation between the employees of the client (*i.e.*, the crew of the tugs) and the client (*i.e.*, the partnership which owned the tugs). Even if that is so—and petitioners earnestly submit that the issue was never directly confronted by this Court in *Hickman*, the solution is not to proceed to the opposite extreme of no privilege or a privilege so narrowly defined as to be virtually meaningless. The reasonable intermediate position, which petitioners consistently urged upon the District Court, is that any employee *for whose conduct the corporation could be liable in connection with the facts disclosed* stands in the shoes of the corporation when consulting the latter's attorney. See Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L. J. 953, 963-66 (1956); Comment, *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 Nw. U. L. Rev. 235, 242-43 (1961).

This formulation of the rule excludes from the protection of the privilege information obtained from persons who, although employees of the corporation, were bystanders or non-participants at the time when the relevant acts occurred. Thus, the president of a company who *witnesses* an accident involving one of the company's employees cannot make a privileged communication to counsel about what he saw, whereas the employee actually involved in the accident can make a privileged disclosure to counsel about what he did or knew. Such a distinction was recognized by this Court in *Hickman v. Taylor*, 329 U. S. 495, 508: ". . . it suffices to note that the protective cloak of this privilege [the attorney-client privilege] does not ex-

tend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."

Judge Kirkpatrick's decision cannot stand without introducing anomalies into the law and without imposing the severest restrictions on counsel who represent corporate clients. The administration of the rule proposed by Judge Kirkpatrick would be completely unmanageable. The relationship between the modern corporation and its attorneys is complex and multi-faceted. Disclosures are constantly flowing to attorneys and legal advice flowing back. Discrete, identifiable decisions on legal matters are atypical; rather, courses of action evolve in piecemeal fashion and often over a period of time. Courts will be confronted with an impossible task if, in each case, they must single out the legal problem, identify the corporate officials vested with decision-making power, and then match the particular disclosures with these officials.

Furthermore, if Judge Kirkpatrick's decision prevails, no lawyer will henceforth make any written memorandum or notation with respect to disclosures made to him by any corporate officer or employee, on the assumption that orders to produce or divulge can hardly run to that which is nonexistent. The inevitable effect of this will be to hamper counsel in the preparation of cases. Less scrupulous members of the bar may resort to tactics of evasion and concealment.

B. The Ruling of the District Court Infringes Upon the Attorney-Client Privilege of the Individuals Interviewed by Counsel.

Canon 37 of the Canons of Ethics of the American Bar Association forbids a lawyer from disclosing matters conveyed to him in confidence by a client. Even if the corporate client, under the compulsion of the District Court's order, were to release counsel from his obligation, the dilemma in which counsel finds himself would not be resolved. Petitioner Sawyer has in his possession written

materials reflecting the interviews. Some are in his possession because he or his partners were the lawyers to whom the disclosures were originally made. The remainder have been disclosed to him as retained counsel of General Electric Company by the lawyers to whom the disclosures were originally made, which lawyers were likewise counsel for General Electric Company at that time. Counsel believes that he and other attorneys who received these disclosures acted in a dual capacity and that a confidential relationship existed between those making the disclosures personally and the attorney to whom they were made.[1]

Not one of these individuals has released counsel from any professional obligation of secrecy which counsel may have toward that individual. A substantial number of the individuals involved, furthermore, are no longer employed by General Electric Company, having been discharged or asked to resign subsequent to the convictions in the criminal cases, so that the corporation is in no position to solicit their assent.

It is obvious, without specifying individual cases, that in many instances there is information in this material which might be a link leading to the indictment of some of these individuals, many of whom were not indicted and have no double jeopardy protection. Even if they could ultimately establish their innocence, they have an absolute right not to have any of this material disclosed. To the extent that they violated the antitrust laws and neither gained immunity before the grand jury nor were indicted,

1. The existence of this dual responsibility is confirmed by the affidavits of Howard J. Aibel and Laurence I. Wood, counsel for petitioner General Electric Company; these affidavits are on file in the District Court. It is further confirmed by the statement of Clarence E. Burke, a former General Electric official, that he considered the lawyer who interviewed him as personal counsel. Mr. Burke actually claimed the protection of his personal privilege respecting disclosures which he made to counsel for General Electric at that time. *Deposition of Clarence E. Burke*, November 28, 1962, N5099-N5101, N5109-N5110.

the statute of limitations on these violations may not run until as late as the latter part of 1963. To the extent that any of these individuals were involved with bids to the federal government, the statute of limitations may not run until as late as 1964. No matter how slight (if more than *de minimis*) the quantum of evidence contained in the memoranda against these individuals, their right to have their disclosures kept secret is *absolute;* it cannot be brushed aside by the fiat of a judge in litigation involving other parties.

The conclusion by the District Court that these individuals abandoned their personal privilege *in toto* merely by acceding to the proviso that the confidentiality of the disclosures was subject to the counsel's right to inform the corporation solely of the *existence* of a violation of company policy (without further facts) does not provide counsel with sufficient assurance that he is free to disclose the information to all the world absent specific authorization from these individuals.

It is true that the order runs to the corporation, but the corporation knows the contents of the memoranda only insofar as its counsel has such knowledge; therefore it is counsel who must actually take the step of breaching the confidentiality of the disclosures.

The full import of what counsel is asked to do is highlighted by the realization that if counsel complies with the order below, he will be placing on the public record, for all the world to see, disclosures of individuals as to which some of them could undoubtedly plead the Fifth Amendment's privilege against self-incrimination if they themselves were asked about these activities. And all of this without any release by those individuals.

C. The District Court Neglected to Apply the Work-Product Principle, Which Protects From Disclosure the Contents of Memoranda Prepared by Counsel in Anticipation of Litigation.

The District Court's order would compel disclosure of the contents of memoranda prepared by counsel in anticipation of litigation. Wholly apart from the question of the attorney-client privilege, such a result cannot be reached until the party seeking disclosure has met its burden of showing good cause. This is the clear teaching of *Hickman v. Taylor*, 329 U. S. 495 (1947), a case which also involved a discovery order by Judge Kirkpatrick.

The salient fact in the case at bar is that, despite invocation of the work-product principle by petitioner Sawyer, Judge Kirkpatrick never found that good cause existed. In fact, his order gives no indication that he considered the work-product principle at all. In view of the quantity and breadth of discovery under the auspices of the Murrah Committee, it is doubtful whether good cause could be found.

In the *Hickman* case two categories of documents were involved: written statements of witnesses and memoranda of counsel reflecting oral communications by witnesses. Aside from the distinction that the communicants there were classed as witnesses, whereas here it is contended that they are the client, the noteworthy point is that none of these memoranda constitutes the written statement of an employee; few have been signed, initialed, or approved by the communicants; and, on the contrary, the overwhelming bulk fall into the second category of documents involved in the *Hickman* case, namely, memoranda written by counsel reflecting oral communications by witnesses.

In requiring divulgence of the contents of this type of memorandum, the District Court is squarely in conflict with the holding of this Court in *Hickman:*

"But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer." 329 U. S. at 512-13.

D. This Is an Appropriate Case for the Court of Appeals to Grant the Relief Requested Under the All-Writs Section of the Judicial Code.

The validity of Judge Kirkpatrick's ruling must be determined through some sort of interlocutory appeal. The route of appeal by contempt citation against counsel has been closed by Judge Kirkpatrick's statement from the bench that whatever sanctions were to be imposed would be directed against the client, not against counsel. To suffer a default judgment on the issue of liability, which is the sanction specifically prescribed in the District Court's order, is an inconceivable alternative in litigation where the stakes are so high.[2] To wait until final judgment is no

2. A default judgment on the issue of liability may not be appealable as a matter of right. See 6 Moore, *Federal Practice* ¶ 54.12[1] (2d ed. 1953). Furthermore, Judge Kirkpatrick has intimated that he might enter a pretrial preclusionary order, which would certainly not be appealable.

alternative at all, since, by then, the issue of privilege will have become moot in fact, if not in law.[3]

Petitioners contend here, as they did before the Court of Appeals, that Judge Kirkpatrick should have certified his ruling for immediate appeal pursuant to the provisions of the Interlocutory Appeals Act, 28 U. S. C. § 1292(b), and that his refusal to do so was based on an erroneous interpretation of the standards contained in the Act. The substance of petitioners' argument on this point may be found in the formal request for certification. Appendix D, *infra*, pp. 32-34. Judge Kirkpatrick's view of what constitutes "a controlling question of law" within the meaning of Section 1292(b), as set forth in his reply to the request for certification (see Appendix E, *infra*, p. 35), is plainly at variance with the legislative history of the Interlocutory Appeals Act, which indicates that the phrase means simply an "important" or "serious" question of law, and not one the resolution of which is necessarily dispositive of the lawsuit—*Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess., Ser. 11, at 19 and 21 (1958); with the position of the Fifth Circuit Court of Appeals as expressed in *Hadjipateras v. Pacifica, S. A.*, 290 F. 2d 697, 702-03 (5th Cir. 1961); and with what critical commentary has been devoted to an analysis of this requirement—see Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L. J. 333, 342-43 (1959), and Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 379 (1961). Finally, in *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, *adhered to on rehearing*, 209 F. Supp. 321 (N. D. Ill. 1962), where the same considerations were present, the district judge certified his ruling for interlocutory appeal, and the Seventh Circuit accepted appeal (on November 7, 1962—No. 13960).

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[3] See *Neff v. Pennsylvania R. R.*, 173 F. 2d 931, 933 (3d Cir. 1949); 4 Moore, *Federal Practice* ¶ 26.37[6] (2d ed. 1962); Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 994 (1961).

Having failed to obtain certification, petitioners' only remaining route of appeal lay in 28 U. S. C. § 1651(a). In circumstances of compelling necessity, a Court of Appeals will grant writs of mandamus and prohibition to set aside a discovery order. *E.g., Atlass v. Miner*, 265 F. 2d 312 (7th Cir. 1959), *aff'd*, 363 U. S. 641 (1960); *Hartley Pen Co. v. United States Dist. Ct.*, 287 F. 2d 324 (9th Cir. 1961); see 4 Moore, *Federal Practice* ¶ 26.37 [4] (2d ed. 1962). This Court itself has utilized prerogative writs to prevent fundamental error. The rights of petitioner General Electric Company are no less grievously affected by Judge Kirkpatrick's ruling than were petitioner's rights in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959), and in *Dairy Queen, Inc. v. Wood*, 369 U. S. 469 (1962), by the denial of a jury trial, or in *La Buy v. Howes Leather Co.*, 352 U. S. 249 (1957), by the reference to a special master.

If Judge Kirkpatrick committed error, the consequences of that error cannot be confined to a particular district or to a particular set of cases. Once the privileged material is disclosed, it is disclosed to all plaintiffs everywhere. The harm will be irreparable, and it will flow from a decision which its author frankly admitted was novel but on which no appellate court has ever passed. Extraordinary relief has been granted in cases of "public importance and exceptional character." *Ex Parte Peru*, 318 U. S. 578, 586 (1943); *Ex Parte United States*, 287 U. S. 241, 248-49 (1932). This is such a case, and the need for action by this Court is imperative.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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Of Counsel:
LEWIS H. VAN DUSEN, JR.,
DRINKER BIDDLE & REATH.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NOS. 29810, 29920, 29928, 29930, 29931, 29817, 29925, 29926, 29927, 29929, 30015, 30017, 30018, 30020, 30021, 30023.

CITY OF PHILADELPHIA

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL., AND RELATED CASES.

SUR MOTION FOR CLARIFICATION AND MODIFICATION OF OPINION ENTERED JULY 19, 1962.

Before KIRKPATRICK, *J.*

This matter comes before the Court on a motion by the defendant, General Electric Company, for modification of certain statements appearing in a memorandum opinion entered July 19, 1962, and for the clarification of other portions of the opinion. The only matter which requires any extended comment is a request for clarification of a statement to the effect that the defendant's claim of privilege with respect to information acquired by its general counsel in the course of his investigation of facts relating to the pending indictment of the company is without any valid basis.

The matter of privilege claimed for communications or statements obtained from various employees of another defendant (Allis-Chalmers) came up recently in the course of depositions taken before me and most of what was said

there represents my present views. In the present case the claim was made in connection with a motion by the plaintiffs for penalties against the defendant for refusal to answer interrogatories. In the Allis-Chalmers case the matter came up on a motion to produce a document containing a statement made by an employee of the corporation to its lawyer.

In both cases the privilege was asserted not only on behalf of the corporation but also on behalf of the employee who was the source of the information sought by the plaintiffs. It is clear in this case (as it was in the other) that the claim of a privilege personal to the employee, claimed in his behalf, is without merit. He was definitely advised by the lawyer that, although his disclosures were "privileged," if it should turn out that they revealed a violation of written company policy directives; the lawyer would "report that fact to management." This disposes of any possible claim that the communications were confidential.

Turning to the claim asserted in behalf of the corporation, preliminarily I may say that I find myself unable to follow Judge Campbell's decision to the effect that the attorney-client privilege is not available to corporations. His opinion is supported by a good deal of history and sound logic, but the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist.

Now in order that the attorney-client privilege can protect a communication made to a lawyer by any person or corporation, it is a first essential that it be made for the purpose of securing legal advice or assistance, and that means advice or assistance for the person or corporation making the communication. If the communication is made to enable the lawyer to advise someone else or if it is made by someone other than the client (the corporation) it is not privileged.

The rule, as stated by Wigmore, is in substance that where legal advice of any kind is sought, communications

and so forth made in confidence by the client are privileged. Corpus Juris Secundum, Witnesses, Section 276, states the rule as follows: "the privilege applies only if . . . the communication relates to a fact of which the attorney was informed by his client . . . for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding." This basic requirement, namely, that the communication must be made by the client to enable the lawyer to advise him, appears in every statement of the rule which has come to my attention.

Now, in cases where an employee of a corporation in an executive or managerial position communicates a fact relative to pending litigation to a lawyer retained or employed by the corporation, the question frequently arises: When he does so, is the corporation seeking the advice of the attorney? In other words, was he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that Hickman v. Taylor, 329 U. S. 495, settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged although it may be within the ambit of the "work product" principle; and it is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege.

Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case.

Now how are we going to determine whether the person making the communication is the client or is a witness? Various answers to the question have been proposed.

Judge Wyzanski, in United States v. United Shoe Machinery Corporation, 89 F. Supp. 357, suggested that the

privilege extends to an extremely broad class of employees, but I cannot help feeling that he is in conflict with Hickman v. Taylor, which very clearly shows the distinction between statements by employees of the client and statements by the client itself.

In arguments before me the rank in the corporation of the employee making the communication has been suggested as a guide. The trouble with that is that in corporate terminology the same title does not always mean the same thing. Manager, executive, officer—those are not clearly-defined terms.

Another approach suggested was whether the acts of the employee which he disclosed to the lawyer in his communication were acts for which the corporation would be responsible; and that, I believe, is the thought expressed by counsel for the defendant in the present case.

However, I do not think that any of these tests is entirely satisfactory and I think there is a better approach.

Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

Of course, it is implicit in the foregoing that the authority of the person speaking with the lawyer to participate in contemplated decisions must be actual authority. In dealing with third persons, apparent authority is frequently in-

volved, but not so in the matter under consideration. A corporation acts through agents, but then we must answer the further question: Agents for what purpose?

It is obvious that the matter as to which the witnesses in this case made the disclosures was a matter of overwhelming importance to the corporation, and that even a department or division head or an employee on a similar managerial level would hardly be given any substantial role in making that decision. It was a matter which, of course, the corporation knew made it probable that very heavy claims for damages would be asserted against it and a decision of that kind could have been made only by the very highest authority.

Of course, there may be cases where an employee is actually authorized to make a decision after consultation with an attorney. An example might be the head of the Claims Department, who frequently has authority to settle damage claims without any action by the Board of Directors or the chief officers, or without their even being advised of it. In such case the communication would be privileged because the claims executive was the person who could act upon the lawyer's advice and he was the person receiving it.

In the present case, as has been noted, the lawyer advised the employee that it might be necessary to report the disclosure to the management, thus sharply differentiating the witness from "the management," meaning, of course, the corporation.

So, I hold that the communications, the sources of the facts required to answer the interrogatories, sought to be protected in the present case are not within the attorney-client privilege.

As to the motion for modification: I accept without question the facts stated in the affidavits, and, with regard to my oral interpretation of the order of February 16, there seems to have been so much misunderstanding of what was said that I think it would be best to eliminate the idea that the line drawn on the organization chart of the defendant is

to be considered for any purpose whatever in the case and to withdraw the entire opinion except the following:

The defendant's answers are obviously not the full and complete answers which the spirit of the discovery rules calls for.

An order will be entered directing full and complete answers to the interrogatories referred to in the motion.

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTIONS NOS. 29810, 29920, 29928, 29930, 29931, 29817, 29925, 29926, 29927, 29929, 30015, 30017, 30018, 30020, 30021, 30023.

CITY OF PHILADELPHIA

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL., AND RELATED CASES.

ORDER.

Plaintiffs having served interrogatories on defendant General Electric Co. (hereinafter sometimes designated as G. E.) on October 27, 1961, with respect to G. E.'s proxy statement dated March 17, 1961; G. E. having purported to answer said interrogatories on December 1, 1961; the Court having, on plaintiffs' motion for default judgment against G. E. for wilful refusal to answer said interrogatories, filed a memorandum dated February 16, 1962 denying plaintiffs' motion, but directing inter alia that the memorandum "shall stand as an order under Rule 37 compelling answers"; G. E., thereafter, on March 12, 1962 having again purported to file answers to said interrogatories; and plaintiffs having again moved for default judgment, or alternative relief, on March 22, 1962, on the ground that the answers to interrogatories 1(c), (f) and (h) were inadequate and failed to comply with the Court's order of Feb-

ruary 16, 1962; and the Court, after hearing on plaintiffs' motion and consideration on briefs and argument, having issued a memorandum opinion on July 19, 1962 holding inter alia that "The defendant's answers are obviously not the full and complete answers which the spirit of the discovery rules calls for," and that "An order may be presented directing full and complete answers to the interrogatories referred to in the motion,"

NOW, THEREFORE, it is hereby ORDERED and DECREED that defendant General Electric Co. shall, on or before November 24, 1962, answer fully under oath, with all the information which said defendant has, including the knowledge of or obtained by its officers, employees and agents, plaintiffs' interrogatories 1(c), (f) and (h) filed October 27, 1961;

Said answers shall include all information received by defendant's vice-president and general counsel, Laurence I. Wood, and shall include the information contained in all written records to which he has access and from which he can refresh his recollection;

Said answers shall not be limited to events occurring after January 1, 1957, and shall include information obtained by defendant at any time from, through or by any of defendant's officers, agents or employees, whether or not said persons are still employed by defendant or were disciplined or discharged by it;

Said answers, without any limitation on any of the foregoing, shall include the present knowledge of each of defendant's present employees who was disciplined for violating company policy and each of defendant's present employees who violated company policy but was not disciplined by reason of a period of limitations adopted by defendant;

Said answers shall give a specific description of each violation and incident referred to in defendant's proxy statement, including the nature thereof; the date; the place;

the products; the other companies involved and the name, position and address of the persons acting on their behalf; and the purchasers and types of purchasers involved;

Said answers shall further give a specific description of each meeting, including the nature thereof; the date; the place and hotel or motel names; the products involved; other companies involved and the name, position and addresses of each person acting on their behalf; the agreements, understandings, arrangements or plans resulting therefrom; and the purchasers and types of purchasers involved;

If such answers are not filed on or before November 24, 1962, or if, after defendant has filed the answers referred to in this order, the Court determine, upon further motion by plaintiffs, that said answers are still inadequate, then default judgment shall thereupon be entered against defendant on the issue of liability.

The original of this Order shall be filed in Civil Action 29810 and conformed copies may be filed in all of the other above-captioned actions with the full force and effect of the original.

/s/ KIRKPATRICK, *J.*

APPENDIX C.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NOS. 29810, 29920, 29922, 29923, 29924, 29928, 29930, 29931.

CITY OF PHILADELPHIA,
A MUNICIPAL CORPORATION

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
AND RELATED CASES.

CIVIL ACTION NOS. 29817, 29921, 29925, 29926, 29927, 29929.

CITY OF PHILADELPHIA AS OWNER AND THE UNITED GAS IMPROVEMENT CO. AS MANAGER OF THE PROPERTY KNOWN AS THE PHILADELPHIA GAS WORKS

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
AND RELATED CASES.

CIVIL ACTION NOS. 30015, 30016, 30017, 30018, 30019, 30020, 30021, 30023, 30024; 30025, 30158, 30159, 30160, 30161, 30162.

PHILADELPHIA ELECTRIC CO., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL.
AND RELATED CASES.

CIVIL ACTION NOS. 30026, 30027, 30162.

CONOWINGO POWER CO.

v.

SANGAMO ELECTRIC, ET AL. AND RELATED CASES.

PLAINTIFF'S SECOND SET OF INTERROGATORIES DIRECTED TO DEFENDANT GENERAL ELECTRIC COMPANY.

Plaintiff directs the following interrogatories to defendant General Electric Company, pursuant to Rule 33 of the Federal Rules of Civil Procedure:

1. With respect to your proxy statement dated March 17, 1961, accompanying the notice of the annual meeting of your shareholders to be held on April 26, 1961, and specifically with respect to the following statements contained therein: ". . . certain officers and employees in three of the company's twenty-one operating divisions had violated . . . in some cases . . . . the antitrust laws. . . . (T)he small group of officers and employees involved had escaped earlier detection through their efforts to keep their activities secret (some of them used code names, wrote anonymous letters, used public phone booths rather than office or home telephones, held meetings at out of the way hotels and motels, etc. . . . (A)ll those who admitted to the company in the course of its investigation that they had violated the policy after 1956 were substantially reduced in rank and salary, and were demoted to positions having no pricing responsibility . . . ", state the following as to each such violation, incident and admission to which you were referring:

(a) What are the three divisions;

(b) The name, position, duties and address of each officer and employee;

(c) A specific description of each violation, incident and admission, including:

(1) The nature thereof;

(2) the date;

(3) the place;

(4) the products;

(5) other companies involved and the name, position and address of the persons acting on their behalf;

(6) the purchasers or types of purchasers involved;

(d) The code names used;

(e) The instances of use of public and home telephones;

(f) A specific description of each such meeting, including:

(1) the nature thereof;

(2) the date;

(3) the place and hotel or motel name;

(4) the products involved;

(5) other companies involved and the name, position and address of the persons acting on their behalf;

(6) the agreements, understandings or plans resulting therefrom;

(7) the purchasers or types of purchasers involved;

(g) The periods of secrecy;

(h) A specific statement of the full and complete content of each such admission, including also

(1) the date made;

(2) the place where made;

(3) to whom made; and

(4) whether oral or written.

(i) The complete details of the disciplinary action taken against each such officer or employee, including

(1) the date; and

(2) the persons who participated in the decision as to discipline.

2. (a) Identify every writing reflecting, reporting or evidencing the matters referred to in Interrogatory No. 1 above; and

(b) State who has custody thereof.

3. State the name, position and address of every person having knowledge of the facts referred to in Interrogatory No. 1.

DAVID BERGER,
City Solicitor.

HAROLD E. KOHN,
Harold E. Kohn,
Attorneys for Plaintiffs, City of Philadelphia and City of Philadelphia as Owner and The United Gas Improvement Co. as Manager of the Property Known as the Philadelphia Gas Works.

Of Counsel:
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By HAROLD E. KOHN,
Attorneys for Plaintiffs, Philadelphia Electric Co. and Conowingo Power Company.

Of Counsel:
VINCENT P. MCDEVITT,
1000 Chestnut Street,
Philadelphia 5, Pa.

APPENDIX D.

October 26, 1962

Hon. William H. Kirkpatrick
Senior Judge of the United
States District Court
2096 U. S. Court House
Philadelphia 7, Pennsylvania

Dear Judge Kirkpatrick:

As I told you in chambers the other day, I believe that your decision on the attorney-client privilege is a critical one and one which the defendants should, in fairness, be permitted to appeal immediately. I gathered, from our conversation, that Your Honor was sympathetic to our position on this point but that you felt that certification could not be appropriately granted under the statutory requirements specified for interlocutory appeals. It is this question which I wish to pursue now—with the hope of convincing Your Honor that this is not only a proper but a compelling case for certification.

The place to start, of course, is section 1292(b) of the Judicial Code, which, as Your Honor knows, was added by Congress in 1958. As set forth in that section, the two standards which govern the exercise of a district judge's discretion are: (1) whether the contested order "involves a controlling question of law as to which there is substantial ground for difference of opinion"; and (2) whether an immediate appeal might "materially advance the ultimate termination of the litigation."

I take it that there is no serious dispute between us that, with respect to Your Honor's recent order directed to General Electric, a controlling question of law is involved about which there is a substantial ground for difference of opinion. It is not enough, I realize, that we disagree with Your Honor's rationale; the truth is, however, that,

while there is a dearth of authority on this question—a fact which itself is extremely significant, others, like Judge Wyzanski and Professor Simon, have indicated their commitment to an approach that substantially differs from Your Honor's.

The more troublesome problem is admittedly the second standard written into section 1292(b): will an immediate appeal materially advance the ultimate termination of this litigation? I suggest to Your Honor that it will. If Your Honor will permit me the assumption, consider what will happen in the event that, after trial and judgment, Your Honor is found, on appeal, to have been wrong. Reference to the statements in the manner prescribed by Your Honor will certainly be held prejudicial error necessitating a new trial—and a new trial beginning again at the discovery stage. More important, however, is the fact that, while the error committed would be reversible error, it would be error which could not be wholly cured by reversal. For once the statements are disclosed, Humpty Dumpty can never be put back together again.

Section 1292(b) is new on the books, and definitive interpretations of its language are absent. Nevertheless, these very considerations which I have referred to have been noted elsewhere as cogent reasons for authorizing an interlocutory appeal. The recognized object—to advance the ultimate termination of litigation—has been thought well-served by allowing an appeal which might avoid a costly and time-consuming retrial. Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L. J. 333, 356-57 (1959); Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 379 (1961); *Benger Laboratories Ltd. v. R. K. Laros Co.*, 24 F. R. D. 450, 455 (E. D. Pa. 1959). I might also point out to Your Honor the use of the word "ultimate," which suggests to me, at least, that something more than speedy disposition at the trial level is contemplated.

Finally, Judge Campbell, of the Northern District of Illinois, who recently held *at pretrial* that the attorney-client privilege is not available to corporations, has certified this question for immediate appeal. I am enclosing a copy of Judge Campbell's opinion filed on October 11, 1962, in which he deals with the question of certification. It is apparent that Judge Campbell, too, thinks that, notwithstanding an interruption in discovery, an appeal is called for in precisely the same circumstances as are present here.

I am aware that acceptance of an appeal on this question at this time may affect the national proceedings, but I must emphasize to Your Honor that an erroneous ruling which would go unchallenged until an appeal from final judgment could have grave consequences, not simply locally, but nationally.

As I disclosed to Your Honor during the conference in chambers—merely in an effort to be entirely candid, we feel that our proper course is to seek a writ of prohibition and mandamus if certification is not to be granted. I mention this only to invite Your Honor's attention to the fact that time is running on the deadline fixed in Your Honor's order. If such an extraordinary writ is to be brought, it should be brought most promptly, and I therefore ask Your Honor to consider this as a formal request for certification and to inform me whether, upon consideration of the foregoing, Your Honor might feel disposed to certify the question.

Very truly yours,

HENRY W. SAWYER, III,
Henry W. Sawyer, III.

HWS/adr
cc: Harold E. Kohn, Esq.

APPENDIX E.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
PHILADELPHIA 7

November 1, 1962

Chambers of
JUDGE KIRKPATRICK

Henry W. Sawyer, III, Esq.
1100 Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia 7, Pennsylvania

Dear Mr. Sawyer:

I have your letter of October 26. You are quite right in saying that I was sympathetic to your desire to have my decision on the question of attorney-client privilege reviewed as soon as possible. In fact, I am really anxious to have such review. However, I do not believe that the matter comes within the scope of Section 1292(b) of Title 28 of the Code, the interlocutory review statute. On May 7, 1962, I filed an opinion in a number of these antitrust actions denying a request for certification. So far as the right to certification is concerned, the situation was practically identical with yours in the present case and, on reading over my opinion, I feel that practically everything I said applies fully to the present case. I agree that the ruling involves a question of law as to which there is substantial ground for a difference of opinion, but I do not think that it is a "controlling" question or that an immediate appeal might "materially advance the ultimate termination of the litigation."

Very truly yours,

WILLIAM H. KIRKPATRICK.

WHK:CAM
CC: Harold E. Kohn, Esq.

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14218

GENERAL ELECTRIC COMPANY AND
HENRY W. SAWYER, 3d,

Petitioners

v.

HONORABLE WILLIAM H. KIRKPATRICK, SENIOR JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

Respondent

Present: BIGGS, *Chief Judge*, MCLAUGHLIN and STALEY, *Circuit Judges*.

Upon consideration of the petition by General Electric Company and Henry W. Sawyer, III, Esquire, filed in this Court November 7, 1962,

It is ORDERED that the prayer of the petition that writs of prohibition and mandamus be issued to the respondent, the Honorable William H. Kirkpatrick, with respect to his order of October 19, 1962 in District Court Civil Actions Nos. 29810, 29920, 29928, 29930, 29931, 29817, 29925, 29926, 29927, 29929, 30015, 30017, 30018, 30020, 30021 and 30023 be and it hereby is denied.

By THE COURT,

MCLAUGHLIN,
Circuit Judge.

Chief Judge Biggs notes his dissent from the order, insofar as it denies a rule to show cause why the writs of prohibition and mandamus should not issue.

Dated: December 31, 1962

APPENDIX G.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,218

GENERAL ELECTRIC COMPANY AND
HENRY W. SAWYER, III,
Petitioners

v.

HONORABLE WILLIAM H. KIRKPATRICK, SENIOR JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Respondent.

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*.

ORDER

The petition for rehearing in this matter is denied.

By THE COURT,

MCLAUGHLIN,
Circuit Judge

Chief Judge Biggs dissents to the making and entry of this order.

Dated: January 16, 1963